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OCTOBER TERM, 1960 63

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Petitioner*,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

PETITIONER'S MEMORANDUM RESPECTING MOOTNESS AND DEFERRAL OF CONSIDERATION

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Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 5 and 43

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Petitioner,*

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

PETITIONER'S MEMORANDUM RESPECTING MOOTNESS AND DEFERRAL OF CONSIDERATION

These consolidated cases arise out of an international extradition proceeding in the United States District Court for the Southern District of Florida held pursuant to 18 U.S.C. § 3184 and the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698. The petitioner here, the Consul General for the Republic of Venezuela in Miami, Florida, acting on behalf of his Government, is the plaintiff in the

extradition case. The defendant is Marcos Perez Jimenez, former President of Venezuela.

The issues in these cases relate to the power of the United States District Judge conducting the extradition proceeding, or a United States District Court acting in aid of the judge, to compel the production of documentary evidence relevant and material to the plaintiff's case and the appropriate mode of and circumstances for the exercise of such power. Events since this Court on March 20, 1961, granted certiorari to review judgments of the Courts of Appeals for the Second and Fifth Circuits dealing with these issues raise a serious question of mootness and suggest at a minimum that consideration of the cases should be deferred.

Defendant in the extradition proceeding was charged with, *inter alia*, a series of financial crimes in abuse of his office. Evidence forwarded to the United States by the prosecuting authorities in Venezuela indicated that evidence of such crimes was to be found in the records of the accounts of the defendant and members of his family and confederates in the First National City Bank of New York, the New York Branch of the Royal Bank of Canada, the French American Banking Corporation in New York and the Chemical Bank New York Trust Company. Plaintiff in the extradition proceeding therefore moved Judge William C. Mathes, then hearing the extradition proceeding in the District Court for the Southern District of Florida, for orders in the nature of subpoenas under Rule 17 of the Federal Rules of Criminal Procedure commanding an official of each of the banks to appear in court with the record of the accounts of the defendant and other designated persons. The banks, with

the exception of the Chemical Bank, and certain of the persons designated, including at least one who claimed to be a depositor in the Chemical Bank, moved to quash the subpoenas. Their motions were denied. Appeals were taken, and in a brief per curiam order, with no statement of reasons, the Court of Appeals for the Fifth Circuit reversed the order denying the motions to quash and ordered the four subpoenas quashed. 274 F. 2d 206. Petitioner applied to this court for a writ of certiorari.

Since no opinion was written, it was impossible to ascertain the ground of the Court of Appeals' decision. The appellants had contended both that there was no power whatever to issue subpoenas, and that the subpoenas could not be effectively served more than 100 miles outside of the district in which the proceeding was conducted. Thus, one possible ground of decision would not have denied to the judge conducting the extradition proceeding the power to compel the production of evidence by some means other than a subpoena reaching more than 100 miles out of the district in which he sat.

Therefore, petitioner, as plaintiff in the extradition proceeding, moved for permission to proceed as upon deposition in accordance with the Federal Rules of Civil Procedure in order to have produced in New York the same bank records that were covered by the quashed subpoenas. The motion was granted, and notices of deposition were served; subpoenas issued out of the United States District Court for the Southern District of New York.

Again there were motions to quash by the three banks that had resisted the original subpoenas and by

depositors, including at least one person claiming to be a depositor in the Chemical Bank. The motions were denied, 183 F. Supp. 865, and the banks and two depositors appealed to the Court of Appeals for the Second Circuit. The Second Circuit reversed in an opinion expressing grave doubts as to whether there was power to compel the production of evidence in an extradition case at the behest of the demanding government and holding that in any event any such power as did exist was set about with such restrictions as to make its exercise inappropriate in this case. 287 F.2d 219.

Petitioner applied to this Court for a writ of certiorari to have this judgment reviewed together with the judgment of the Fifth Circuit. On March 20, 1961, the Court granted both petitions and consolidated the cases.

Since that time, on June 16, 1961, Judge George W. Whitehurst, who had succeeded Judge Mathes in the conduct of the extradition proceeding, announced from the bench his decision that the evidence submitted on behalf of the plaintiff in support of the charges of financial crimes against the defendant was sufficient to justify his surrender to the Venezuelan authorities. In accordance with 18 U.S.C. § 3184, he at once ordered the defendant committed to await action by the Secretary of State, and on June 23, 1961, he formally certified his finding that the evidence was sufficient to the Secretary of State, and entered his certification as the final order in the extradition proceeding.

There is no appeal from the final decision of a judge or other magistrate in an extradition case under 18 U.S.C. § 3184. *Collins* v. *Miller,* 252 U.S. 364 (1920).

If the magistrate makes a finding of probable cause to believe the defendant guilty of crimes named in the applicable treaty he is to certify the same to the Secretary of State, together with all the evidence he has received, and commit the defendant. The Secretary of State makes the final determination whether to surrender the defendant to the authorities of the demanding government. 18 U.S.C. § 3186.

However, the judicial finding that results in the defendant's commitment and is a prerequisite to his surrender is frequently tested by the filing of a petition for a writ of habeas corpus challenging the detention of the defendant under the extradition magistrate's warrant of commitment. The defendant Perez Jimenez has taken steps to challenge Judge Whitehurst's determination of his extraditability by means of such a petition for a writ of habeas corpus.*

So general has the custom become of seeking review of a judge's final determination in an extradition proceeding by means of habeas corpus that the two proceedings virtually coalesce. Although the scope of review is limited, *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925), the habeas corpus proceeding sometimes results in orders in the nature of remands. Thus in *Application of D'Amico*, 185 F. Supp. 925 (S.D.N.Y. 1960), *appeal dismissed sub nom. United States ex rel D'Amico* v. *Bishopp*, 286 F.2d 320 (2d Cir. 1961), there was, on habeas corpus, a remand to the extradition

* The defendant had previously filed a petition seeking his release from alleged detention on the warrant of arrest on which he was brought before the judge for the extradition hearing. He has now asked leave to amend that petition so as to attack on various grounds, including insufficiency of the evidence, his detention on Judge Whitehurst's warrant of commitment.

magistrate to make more specific findings, and both the plaintiff and the defendant were to have the opportunity upon such remand to introduce further evidence. In *Collins* v. *Miller*, 252 U.S. 364 (1920), this Court dismissed an appeal from a somewhat similar remand to an extradition magistrate which was ordered on habeas corpus.

Likewise, the Secretary of State has on occasion remanded extradition proceedings for the receipt of further evidence. 4 Hackworth, *Digest of International Law* 121-23, 128, 129 (1942).

In these circumstances petitioner submits that these cases are not now moot. There remains "an actual controversy, and adverse interests," *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43 (1944), with respect to the availability of the bank records for use as evidence in the extradition proceeding. It would not be appropriate to require petitioner, as the representative of a sovereign nation claiming rights under a treaty, to relitigate the entire controversy from the beginning should the need arise for asserting actively again his interest in securing the records. The controversy, however, is not now live or pressing. It may become live again if, as a result of the habeas corpus proceeding or otherwise, the extradition proceeding is reopened or renewed.

Unless and until that happens, however, there is no urgent need for the Court to resolve the issues raised by that controversy. Therefore, petitioner respectfully suggests that the Court retain the cases on its docket and postpone briefing and argument until it is clear whether the extradition proceeding under 18 U.S.C. § 3184 is to be reopened or renewed, in which

case there would be need for this Court's determination of the "actual controversy, and adverse interests" regarding the production of the bank records. Petitioner would keep the Court advised as to the course of further litigation and any relevant action by the Executive.

If the Court is of the view that the case is now moot, petitioner submits that the Court should follow its customary practice by vacating the judgments below and remanding No. 5 to the Court of Appeals for the Fifth Circuit and No. 43 to the Court of Appeals for the Second Circuit, with instructions to each of those courts to order the proceedings with respect to the subpoenas and the depositions dismissed, so that none of the orders or judgments below will have the effect of res judicata. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted,

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